BEFORE THE STRUCTURAL PEST CONTROL
DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA

In the Matter of the Decision of
Agricultural Commissioner of
the County of Santa Barbara
(County File No. 049-SCP-SB-04/05)

Docket No. S-010

DECISION

Fidelity Fumigation
156 Surfbird Court
Guadalupe, CA 93434

Appellant/

Procedural Background

Pursuant to Business and Professions Code (BPC) § 8617, Food and Agricultural Code (FAC) § 15202, the Santa Barbara County Agricultural Commissioner (CAC or "commissioner") may levy a civil penalty up to $5,000 for each "serious" violation of certain State structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Santa Barbara CAC found that Fidelity Fumigation (appellant) violated Section 6780(b) of Title 3 of the California Code of Regulations (CCR) by failing to wrap or clamp the tarpaulin around the fan housing, and FAC § 12973 by failing to aerate the house for one hour as required by the Vikane labelling. The Commissioner imposed a total penalty of $552.00 for one count each for violations of 3 CCR § 6780(b) and FAC § 12793.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of the appeal under BCP § 8662. Members serving on the Disciplinary Review Committee were Peter Giammarinaro for the structural pest control industry, Kelli Okuma for the Structural Pest Control Board (SPCB), and Eric Walts for the Department of Pesticide Regulation (DPR). The Committee heard oral argument via telephonic conference on January 10, 2006. The appellant was represented by Vincent Guerrero, III. The Santa Barbara CAC was represented by Debra Trupe.

Standard of Review

The Committee decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner's decision. The Committee notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In making the substantial evidence determination, the Committee draws all reasonable inferences from the information in the record to support the findings and reviews the record in the light most favorable to the commissioner's decision. If the Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

Appellant's Contentions

Regarding the finding of a violation of 3 CCR § 6780(b), the appellant contends that uncontradicted evidence shows he wore a self-contained breathing apparatus (SCBA), and placed the fan and vent tube in the tent. Regarding the finding of a violation of FAC § 12793, the appellant takes issue with the hearing officer's determination that it did not aerate the house for one hour and maintains that his fumigation log, submitted into evidence, shows that the inspector's testimony about the timeline is not reliable.

Analysis

- Evidence Supporting the Hearing Officer's Finding that the Appellant Violated 3 CCR § 6780(b).

Whenever an employee may be exposed above the exposure limit set for sulfuryl fluoride, the employer must either require the use of air-supplied respirator equipment, employ continuous monitoring, or operate under the provisions of the appropriate plan approved pursuant to section 6780(c). 3 CCR § 6780(b). In this case the approved plan is the Tarpaulin Removal Aeration Plan (TRAP). *See* Agency Exhibit 6. There is no dispute in the record that Fidelity Fumigation neither required the use of SCBAs, nor continuously monitored levels of sulfuryl fluoride to warn its employees before the permissible exposure limit was reached. By following the procedures described in the TRAP, the employer fumigating with sulfuryl fluoride avoids the requirement of providing its employees with SCBAs or monitoring the levels of sulfuryl fluoride.

The TRAP specifies that "fan(s) shall be installed at the seams with the tarpaulin *wrapped or clamped around the fan housing*." Agency's Exhibit 6 at step 3 (emphasis added). The plain import of these words is that the tarpaulin should be more or less in contact with the fan housing without gaps. If there is an ambiguity as to exactly how tightly the tarpaulin must be "wrapped or clamped around the fan housing", it is resolved in other portions of the TRAP. Step 5 of the TRAP begins, "Start the fan to draw the tarpaulin down" and step 6 and 7 begin "As the tarpaulin contracts. . ." Thus it is clear that to properly operate under the TRAP, the tarp must be

wrapped or clamped tightly enough around the fan housing so that when the fan is turned on negative air pressure is created and the tarpaulin consequently "draws down" and "contracts".

Substantial and uncontradicted evidence in the record supports the Hearing Officer's conclusion that the appellant did not clamp or wrap the tarpaulin around the fan housing as required by the TRAP. The Hearing Officer determined that there was a gap between the opening in the tarpaulin and the top of the fan of at least twelve inches based on the undisputed testimony given at the hearing by Inspector Rajala that the tarpaulin was opened up to three feet above the ground and by Mr. Guerrero that the fan stood eighteen to twenty-four inches off the ground. In addition, Inspector Rajala's testimony that the opening in the tarpaulin formed a triangle around the fan was not disputed. Tape of Hearing.

Also, the Hearing Officer concluded that the tarpaulin did not draw down around the structure. This conclusion is supported both by Inspector Rajala's uncontradicted testimony and notes. *See* Tape of Hearing; Agency Exhibit 11. Whether this is because the tarpaulin was not properly wrapped or clamped around the fan housing, or because the workers removed the other clamps and sand snakes to quickly, or both, it supports the Hearing Officer's conclusion that the appellant did not operate under the TRAP. The basic principle of the TRAP is to exhaust the air space behind the tarpaulins. *See* TRAP, Agency Exhibit 6 ¶ 1.

The appellant's argument on appeal that the record shows he was wearing a SCBA when he placed the fan in the opening is not relevant to the basis of the Hearing Officer's conclusion that the Fidelity failed to operate under the TRAP articulated above. However, we note that step two of the TRAP specifies, "if fans are installed just prior to aeration, respiratory protection (SCBA) must be worn." Opening a seam in the tarpaulins prior to aeration in order to place the fan is part of "installing" the fan. If a worker opens up that initial seam, that worker, and not just the person who places the fan in the opening, must wear a SCBA in order to comply with the TRAP.

Thus, there is substantial evidence in the record to support the Hearing Officer's conclusion that the appellant violated 3 CCR § 6780(b).

- Evidence Supporting the Hearing Officer's Finding that the Appellant Violated FAC § 12973.

Section 12973 of the Food and Agricultural Code (FAC) prohibits use of any pesticide that is in conflict with the registered labeling delivered with the pesticide. There is no dispute that the registered labeling directs the fumigator to aerate the structure with all operable windows and doors open for one hour. See Agency Exhibit 9. There is simply conflicting evidence in the record on whether or not the house was aerated for the full hour. Inspector Rajala testified that the aeration of the house began at 11:20 AM (when the front door was opened) and ended at 11:50 AM (when the front door was closed). Tape of Hearing. Vincent Guerrero testified that he arrived at the site at 11:30 AM and that "I did stay there for the one hour; I know I did." Tape

of Hearing. The appellant also placed his fumigation logs into evidence to corroborate his testimony that he arrived at 11:30.

The Hearing Officer found Inspector Rajala's testimony and written narrative more credible on this point than Mr. Guerrero's testimony and documents. *See* Findings of Fact nos. 13-14. The Hearing Officer is in a far better position than the Committee to make judgments about the relative weight and credibility of conflicting evidence. After full review of the tape of the hearing, we see no reason to question that judgment. Inspector Rajala's testimony and narrative provide substantial evidence from which the Hearing Officer could reach her conclusion that the structure was not aerated for the full hour.

Appropriateness of the Fine

On this appeal, the Committee is only authorized to sustain, modify by reducing the amount of the fine levied, or reverse the decision. BPC § 8662(b)(7). Section 1922 of Title 16 of the California Code of Regulations (CCR) defines serious violations in part as "violations that are repeat violations of those in subparagraph (B) [defining "moderate" violations]". According to 16 CCR § 1922, the fine range for "serious" violations is $401-$1,000. However, a county agricultural commissioner or the Structural Pest Control Board does have the authority to levy a fine for up to $5,000 for a violation classed as "serious" under 16 CCR § 1922, pursuant to superceding statutory authority. *See* BPC § 8617(a).

The commissioner fined the appellant $401 for Count One (violation of 3 CCR § 6780(b)). Count One was treated as a serious violation because it is a repeat of a moderate violation, in which the appellant was previously fined for a violation of this same regulatory section. *See* Agency Exhibit 8. Thus, no reduction of the fine is appropriate.

The commissioner fined the appellant $151 for Count Two (violation of FAC § 12973). As to Count Two, in its Notice of Proposed Action (NOPA) the CAC classed it as a "serious" violation under 16 CCR § 1922, because it was a repeat violation, and proposed a fine of $401. In her decision, the Hearing Officer stated that Count Two is not a repeat violation and proposed reducing the fine for Count Two to $151. The CAC subsequently adopted the Hearing Officer's decision in full and ordered appellant to pay a total fine of $552. The commissioner now argues on appeal that Count Two should be classed as a serious violation under 16 CCR § 1922, and asks that the Committee reinstate the fine of $401 proposed in the NOPA.

There are two problems with the commissioner's request. First, the issue is moot because, as noted above, the Committee does not have the authority to modify the commissioner's order by increasing the fine. Second, the CAC has no right of appeal under BPC § 8617. *See* BPC § 8617(d)(providing right of appeal to the person "upon whom the commissioner imposed a fine . . .."). Thus, no modification of the fine is appropriate.

However, we note that 16 CCR § 1922 does not define "repeat violation". In its NOPA, the CAC interpreted a repeat violation to be any second violation in the same class under § 1922 (not necessarily a second violation of the same code or regulatory section). The commissioner supports this interpretation on appeal by reference to an analogous regulation in 3 CCR § 6130 and guidance issued by DPR to clarify that regulation. The CAC's interpretation of "repeat violation" in its NOPA was a permissible, reasonable reading of § 1922. The Hearing Officer, on the other hand, appeared to take the position that "repeat violation" means a second violation of the same code or regulatory section, which the Commissioner subsequently adopted. By the same token, this is also a permissible interpretation of § 1922.

The commissioner is not afforded a right of appeal under BPC § 8617 because under that section it is the *commissioner's* action in levying the $552 fine that is being appealed. In doing so, the CAC fully adopted the Hearing Officer's decision. However, BPC § 8617 does not require the commissioner to adopt a Hearing Officer's decision in its entirety in order to levy a penalty. The CAC only has to *provide* a hearing if requested, so that a record is created, before exercising its authority to levy a penalty. In its Notice of Decision and Order, the commissioner had the option of adopting the Hearing Officer's findings of fact, of what happened, but rejecting her purely legal conclusion, her reading of "repeat violation" in § 1922, and on that basis levying a fine of $802. If the CAC were to take exception to the hearing officer's interpretation of the applicable law, and the respondent appeals its order on that basis, then the Committee would exercise its independent judgment in resolving that purely legal question.

Conclusion

The record shows the Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The Santa Barbara CAC's decision is affirmed. The Commissioner's order is stayed until 30 days after the date of this decision to provide opportunity for the appellant to seek judicial review of the Committee's decision as set forth below.

The $552 civil penalty levied by the commissioner against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date of this decision. The appellant is to mail the payment along with a copy of this decision to:

Structural Pest Control Board
1418 Howe Avenue, Suite 18
Sacramento, California 95825

Judicial Review

BPC § 8662 provides the appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure § 1094.5.

STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE

Dated: 1/25/2006

By: _____
Eric Walts, Member
for and with the concurrence of all members
of the Disciplinary Review Committee